Supreme Court, U.S.
FILED
NOV 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-6139

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CLARA B. WATSON,

Petitioner,

v.

FORT WORTH BANK & TRUST,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR THE AMERICAN SOCIETY FOR PERSONNEL ADMINISTRATION, THE INTERNATIONAL PERSONNEL MANAGEMENT ASSOCIATION AND THE EMPLOYMENT MANAGEMENT ASSOCIATION AS AMICI CURIAE SUPPORTING RESPONDENT

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November 1987

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QUESTION PRESENTED

Does Title VII of the Civil Rights Act of 1964 require that a final managerial judgment to promote an individual employee be supported by the same complex proof of job relatedness required for standardized selection protocols that systematically deny employment opportunities to a disproportionately high number of the members of protected groups?

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Consent to Filing

This amicus brief is filed pursuant to Supreme Court Rule 36.2, with the written consent of all parties. Letters of consent have been filed with the Clerk of this Court.

Interest of the Amici Curiae

The American Society for Personnel Administration ("ASPA") is the world's largest association of personnel and human resources professionals, representing over 36,000 members in business, government, and education dedicated to the furtherance of personnel and human resource management. Accordingly, ASPA and its members have a keen interest in the orderly development and enforcement of the myriad laws and regulations which govern many aspects of employment.

The International Personnel Management Association ("IPMA") represents more than 1,000 public sector agencies including civil service commissions, merit system boards and personnel departments at the federal, state and local levels of government. The Association represents over 55,000 individuals, primarily personnel professionals and personnel administrators in the public sector. IPMA attempts to foster and develop interest in sound personnel administration by providing a focus and forum for personnel professionals throughout the United States and abroad.

The Employment Management Association ("EMA") is a private, non-profit organization comprised of employment and human resources executives representing many of the nation's top companies and institutions. Through newsletters, advisory bulletins, research reports, publications, regional meetings and national conferences, EMA members analyze and discuss subjects of vital interest to the employment community. EMA seeks to create an awareness of today's critical employment problems and help develop meaningful solutions.

As the major associations of the human resources profession, ASPA, IPMA and EMA are vitally concerned with the orderly development of the law defining, in practical terms, the meaning of equal employment opportunity. ASPA, IPMA and EMA have long recognized their special responsibility to support and encourage compliance with fundamental principles of equal employment opportunity in the administration of efficient, workable personnel management systems. ASPA, IPMA and EMA believe that the present case provides the proper vehicle for this Court to reaffirm the appropriate balance between the compatible goals of providing equal employment opportunities and preserving the right of managers to make legitimate personnel judgments in the best interest of their organizations.

Statement of Facts

Clara Watson, a black woman, was hired as a proof operator by Fort Worth Bank & Trust (the "Bank") in August 1973. In January 1976, Watson was promoted to the position of teller in the Bank's motor bank. Watson was promoted once again in February 1980, this time to the position of commercial teller in the Bank's main lobby. (J.A. 205) That same month, Watson sought a further promotion to the position of supervisor of all the Bank's tellers. However, the position was awarded to another employee who already supervised the Bank's bookkeeping department. During the following year, Watson applied unsuccessfully for promotions to three other supervisory positions. (J.A. 205-6) In two instances, an employee with substantially greater experience, Ms. Pat Cullar, was selected over Watson, first for the position of supervisor of motor bank tellers and later for the position of supervisor of lobby tellers. In the other case, the supervisory position sought by Watson was awarded to a person who was strongly recommended by the person vacating the position and who, unlike Watson, had at least some supervisory experience. (J.A. 190-194, 196-7)

The evidence showed that other than the Bank's decisions concerning Petitioner, on only one occasion had a black person applied for a promotion that was awarded to a white. (J.A. 201)

Each of the Bank's promotion decisions—both the decisions that produced two promotions for Petitioner and the decisions about which Petitioner complains—was the product of a promotion process which is used in literally every American workplace. When a vacancy occurred, the Bank manager who would be supervising the new incumbent judged the mix of qualifications presented by competing applicants and selected the candidate he or she believed would be best for the job. A variety of factors were considered by the Bank's managers, including experience, job knowledge, productivity, ambition and personal relations between supervisor and applicant. (J.A. 131-8, 246 n.26) In short, relying on business judgment, the boss chose the individual who appeared most likely to contribute to the success of the organization.

Summary of Argument

Petitioner's indictment of promotion decisions involving "discretionary subjective evaluations" (Pet. Br. 11) attacks the most common method used by American employers to make final selections among competing applicants. Petitioner's refrain that personnel judgments are suspect or illegitimate if they are "subjective" relies on a distinction that is artificial. All personnel decisions involve value judgments by those responsible for the success of an enterprise. To label these judgments "objective" or "subjective" is of no help in deciding how they should be reviewed under Title VII. The decisions of this Court have never relied on such a distinction.

Intentional discrimination against individual employees was the principal evil Congress sought to eliminate when it enacted Title VII. This Court has enforced Title VII in

the absence of proof of intent only in cases where employers have erected systematic barriers to employment which have a disparate impact on members of protected groups. In *Griggs v. Duke Power Company*, 401 U.S. 424 (1971) this Court reviewed employment criteria which, though neutral on their face, too often worked to deny to black job applicants the opportunity to be considered on their individual merits. The diploma and test requirements imposed in *Griggs* permitted no case-by-case judgments about other qualities that might have recommended these candidates for selection. Under these special circumstances, this Court made an exception to the essential principle of Title VII that employers should be liable only for intentional discrimination. The Court held that specific selection devices which impose systematic, irrebuttable barriers to employment opportunities for blacks cannot survive Title VII review unless shown to "have a manifest relationship to the employment in question." *Id.* at 432.

In contrast to the well-defined, systematic criteria which disqualified a group of blacks from further consideration in *Griggs*, Petitioner has identified no specific employment criterion which she claims the Bank used to her disadvantage in evaluating her promotion application. Nor has Petitioner identified a test or employment policy which operated to the disadvantage of blacks generally in the competition for promotions. Having failed to show that she was treated any differently than her white competitors, Petitioner nevertheless insists that a promotion decision is inherently suspect if it is based on a manager's business judgment. According to Petitioner, every employer that permits its managers to exercise judgment in personnel decisions has to be prepared to prove the business necessity of such judgments. Since no illegitimate test or promotion criterion has been identified by Petitioner, this means much more than validating a single selection device, complex as even that usually proves to be. Petitioner appears to demand that employers "scientifically

validate" the general practice of permitting managers to make judgments about individual promotions, a practice so universal that it has never before been questioned in this Court. Indeed, this Court has taken pains to make sure that, in the absence of proof of intentional discrimination, routine business judgments about individuals are not second-guessed in the name of Title VII.

As is best illustrated by the discussion of "scientific validation" presented by Petitioner's amicus, the American Psychological Association, massive new burdens would be placed on employers by a requirement that they validate each of the criteria and procedures used to make judgments about individual employees. Petitioner's theory of Title VII would, therefore, lead inexorably to one of two results never intended by Congress. Employers that endeavor to "validate" the practice of permitting managers to make judgments will suffer the untold expense of validating a continuous stream of personnel decisions, followed by litigation of remarkable complexity, pitting one team of statisticians against another in battles about the quality of those validation efforts—and all in the absence of any proof of an intent to discriminate. For employers who choose not to employ "validators" to attempt to certify their judgments—perhaps because they simply cannot afford to do so—there will be only one other option. In order to avoid Title VII liability without "scientific validation" of every aspect of personnel management, these employers will see to it that their managers' judgments have no disparate impact on minorities by hiring and promoting on the basis of class membership. In short, numerical quotas become a low cost alternative to the impossibly complex system demanded by Petitioner and her amici.

The Court should reject Petitioner's effort to subject judgments about individual employees to disparate impact analysis when the disparate treatment approach has already provided her the opportunity to prove unlawful dis-

crimination. ASPA, IPMA and EMA urge the Court to reaffirm that the limited purpose of disparate impact analysis is to review specific employment devices which have the effect of systematically excluding members of protected groups from employment opportunities.

Argument

A. The Debate About The Legitimacy of "Subjective" vs. "Objective" Selection Criteria Badly Mischaracterizes What This Case Is About.

Petitioner, her amici and the authorities and commentators on which they rely use a confusing array of concepts to describe the Bank's method of making promotion decisions. The Bank's system is characterized as either a "subjective procedure" (Pet. Br. 39), one based on "subjective criteria" (*id.* at 47) or one "not guided by any criteria whatsoever." (*Id.* at 19.) Petitioner asserts that "the distinction between subjective and objective selection criteria is . . . artificial and pointless" (Pet. Br. 34), yet relies heavily on the notion that decisions concerning her applications for promotion are highly suspicious—and must be validated by "objective standards"—precisely because the process leading to those decisions was "highly subjective." (Pet. Br. 48.)

For most employers—and in light of this Court's jurisprudence —the debate about "subjective" versus "objective" employment procedures and criteria is academic and irrelevant. That debate blurs the very practical dispute before this Court without providing a sensible framework for its resolution. The monumental issue lying at the heart of this case cuts across the dimension of "subjectivity" versus "objectivity". The real issue is whether promotion decisions in which a few individuals compete for a single vacancy will continue to be based on a manager's business judgment, subject only to proof of an intent to discriminate, or whether the process by which employers make

individual personnel judgments will be saddled with the prior restraint of statistical validation.

The pointless debate about "subjectivity" and "objectivity" is most inappropriate because it has so little to do with the facts of the case before the Court. Petitioner sought to prove that she was judged by different standards than whites who competed with her for promotions. Accordingly, the Bank was obligated to identify its reasons for preferring other candidates, and it did so—experience, leadership, performance, and so on. The district court had the opportunity to judge whether these criteria actually distinguished her competitors or were a pretext for discrimination. The question for the district court had nothing to do with whether these criteria were "objective" or "subjective". The only appropriate question was whether Petitioner was tested by *different* criteria than her competitors. Petitioner's challenge was unsuccessful because the district court found that the reasons stated by Bank managers for promoting others were genuine and were not a pretext for discrimination.[1]

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[1] Petitioner's contention that it was "impossible" for her to succeed under a disparate treatment analysis because the Bank relied on "subjective" criteria is disproven by the entire history of Title VII enforcement. Petitioner argues that "[t]he employer can always put forth a subjective reason for selecting the 'best qualified' applicant the one with the 'best leadership' and 'ability' and these facially neutral standards are impossible to rebut." (Pet. Br. 56.) This is nonsense. Clearly, such rationales may be rebutted by evidence of the claimant's superior leadership skills or ability to do the job in question. This process is precisely the method of proof envisioned by this Court for deciding Title VII claims involving individual personnel decisions. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). In *Burdine*, the Court of Appeals had made the same argument now made by Petitioner about the difficulty of proving pretext and had placed the burden on the employer to *prove* that its stated reasons were genuine. This Court rejected that model of proof citing a variety of factors which left it "unpersuaded that the plaintiff will find it particularly difficult to prove that a proffered explanation lacking a factual basis is a pretext." *Id.* at 258.

Petitioner's effort to show that the Bank's system for making promotion decisions had an adverse impact on blacks never merited serious consideration. The failure of Petitioner's disparate impact theory did not depend on considerations of "subjectivity" or "objectivity", but was unavoidable since it had no factual predicate. The district court's finding on this point was clear.

> The evidence showed that in addition to plaintiff, only one black, Sylvia Harden, had applied for promotions which were given to whites. Harden testified at trial that she did not allege that she has been discriminated against on that basis.

(J.A. 201.) Thus, whether properly labelled "objective" or "subjective", the criteria used by the Bank to make promotion decisions favored a white applicant over a black in the case of Petitioner and in only one other isolated case.

Petitioner's broadside attack on the Bank's personnel judgments concerning promotions as being "subjective," inherently suspect and unlawful in the absence of "scientific validation" is misguided. Every personnel decision reflects a business judgment about what is important to an organization and whether certain applicants possess those attributes. This is true whether the decision is made by a manager judging the responsiveness and demeanor of an applicant during an interview or by a written test instrument used to narrow a field of applicants. Whatever the format for its application, business judgment is the common denominator of all personnel decisions. Labelling one format "subjective" and another "objective" says precious little about the appropriate method of proof for deciding whether a judgment discriminated among applicants unlawfully.

A further problem with the "subjective/objective" dichotomy Petitioner seeks to construct is that it ignores the fact that most personnel decisions are multi-faceted, involving some criteria that Petitioner might label "objec-

tive" and some Petitioner might call "subjective." No matter how telling an employer's system for rating "objective" qualifications may be, most rating systems leave choices that must be made after the measurement of these qualifications has been completed. This Court has recognized:

> [i]t is a standard tenet of personnel administration that there is rarely a single, 'best qualified' person for a job. An effective personnel system will bring before the selecting official several fully-qualified candidates who each may possess different attributes which recommend them for selection. Especially where the job is an unexceptional, middle-level craft position, without the need for unique work experience or educational attainment and for which several well-qualified candidates are available, final determinations as to which candidate is 'best qualified' are at best subjective.

Johnson v. Transportation Agency, Santa Clara County, California, 480 U.S. ____ , 94 L.Ed.2d 615, 636 n.17 (1987) (quoting Brief for American Society for Personnel Administration as *Amicus Curiae* in support of Respondents).

In *Johnson*, a rating system certified seven candidates as qualified for selection, leaving the final selection to the discretion of the Agency's Director. This Court expressed no disapproval over the fact that the Director "did not regard as significant" the candidates' different numerical ratings when he chose one individual from among those qualified. *Id.* at 626. Indeed, the Court thought that the legitimacy of the Director's final selection was enhanced because he relied on numerous factors independent of both gender and numerical ratings. *Id.*[2] To follow numerical

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[2] In testimony strikingly similar to the testimony of the Bank's Mr. Burt, the selecting official in *Johnson* testified: "I tried to look at the whole picture, the combination of her qualifications and [her competi-

ratings blindly would be to convert them inappropriately into "masters of reality." *Griggs v. Duke Power Co.*, *supra*, 401 U.S. at 433. Especially in the selection of supervisory personnel, few employers would be comfortable making hiring or promotion decisions "by the numbers" alone.

The Court should resist Petitioner's call to mechanistically divide the universe of personnel decisions into "subjective" and "objective" decisions. These labels are not helpful in understanding how individual personnel judgments are made and do not help distinguish the narrow category of exclusionary screening devices that are proper subjects for disparate impact analysis.

B. The Application of Complex Validation Strategies To Individual Personnel Decisions Is Not Required By Title VII.

1. Title VII Reflects the Traditional Approach Of Regulating Process and Opportunity, Not Substance Or Results.

In crafting an intricate pattern of obligations and duties to be met by our nation's employers, Congress has drawn a careful balance between legitimate business discretion and essential individual rights. Laws regulating employment relations have sought to provide guideposts sufficient to ensure that employment processes are conducted within the bounds of equal opportunity. Yet, these laws impose limitations upon employers which are only limitations of process, not result. Congress has never presumed it had the authority or ability to prescribe "good" or "approved" employment practices, nor has it delegated this job to the courts. Rather, statutes regulating the workplace have been constructed to eliminate only a handful of illegitimate employment practices from the universe of employment decisions.

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tor's] qualifications, their test scores, their expertise, their background, affirmative action matters, things like that . . . I believe it was a combination of all those." *Id* at 626. *See also* Pet. Br. at 8.

Evidence of this basic philosophy can be found in the National Labor Relations Act ("NLRA"), which served as a model for Title VII, and in Title VII itself. The duty to bargain in good faith lies at the heart of the statutory scheme of the NLRA. And it is here we find the strongest admonitions not to interfere in the substance of employment decisions. The test of good faith bargaining is not one of "objective" reasonableness. The parties are not required to "make 'objectively reasonable proposals' and employ objectively reasonable practices and procedures."[3] Had a standard of objective reasonableness been adopted, the judiciary would have been put in the position of setting the terms and conditions of individual collective agreements, thus imposing "a substantial interference by government with freedom of contract."[4] In *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970), this Court reaffirmed the principle that good faith bargaining does not permit a government authority to impose the substantive terms of a collective bargaining agreement.

> One of [the] fundamental policies [of the NLRA] is freedom of contract. While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.

Id. at 108.

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[3] Wellington, *Freedom of Contract and the Collective Bargaining Agreement*, (1963) Lab. L.J. 1016, 1022.

[4] *Id.* at 1022. *See also, NLRB v. American National Ins. Co.*, 343 U.S. 395 (1952).

As with the NLRA, Title VII was not intended to substitute the judgment of agencies, courts or even recognized experts for the essential business judgments of individual employers. Rather, the law merely sets limits on business judgment consistent with the national policy prohibiting invidious forms of employment discrimination. Within these wide boundaries, employers are free to conduct their affairs guided by their own judgment of what is best for their business.

The apparent intentions of the 88th Congress, and particularly of the primary sponsors of Title VII, have been cast in different hues as the history of the statute has been examined over and over again. Shining through clearly, however, was an overriding fear expressed by many members, and repeatedly allayed by sponsors, that Title VII would not permit employers to continue to exercise legitimate judgment in employment decisions. Particularly illustrative of this debate were questions raised by Senator Dirksen and the responses of Senator Clark.

> Objection: The bill would make it unlawful for an employer to use qualification tests based upon verbal skills and other factors which may relate to the environmental conditioning of the applicant. In other words, all applicants must be treated as if they come from low-income, deprived communities in order to equate environmental inequalities of the culturally deprived group.
>
> Answer: The employer may set his qualifications as high as he likes, and may hire, assign, and promote on the basis of test performance.
>
> Objection: Under the bill, employers will no longer be able to hire or promote on the basis of merit and performance.
>
> Answer: Nothing in the bill will interfere with merit hiring, or merit promotion. The bill simply

> eliminates consideration of color from the decision to hire or promote.

110 Cong. Rec. 7218 (1964), *reprinted in* the EEOC's Legislative History of Titles VII and XI of Civil Rights Act of 1964, at 3015.

This policy of non-interference has been a guiding principle in the decisions of this Court interpreting Title VII. This Court has recognized that the fundamental purpose of Title VII is the preservation of equal employment *opportunities* for individuals and the removal of exclusionary *barriers* which deny to members of protected groups the opportunity to compete. For example, in *Griggs*, *supra*, the Court left to Duke Power the matter of how selections would be made once blacks were admitted to the competition. The Court's later opinions in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), *Furnco Construction Corporation v. Waters*, 438 U.S. 567 (1978), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), made clear that employers are free to set any rules for the competition among individuals, so long as competitors of all races face the same hurdles.

The long-standing, well-settled policy of avoiding unnecessary interference with business judgment in regulating employment relations faces a frontal assault by Petitioner and her various amici. Petitioner's approach would require employers to base individual personnel decisions on criteria and methods amenable to "scientific validation," for the first time telling employers what they *must* do in the name of equal employment opportunity rather than what they may *not* do. An essential characteristic of this Court's decision in *Griggs*, *supra*, was that Duke Power Company could bring itself into compliance with Title VII by simply dropping its diploma and test requirements. Under Petitioner's approach, the Bank's hands would be bound to the process of "scientific validation" of its promotion decisions. The Bank must either

validate its "subjective" judgments or it must substitute, and validate, "objective" test mechanisms to take the place of those judgments. Statisticians, industrial psychologists and consultants would be indispensable actors in the role of "validators" required to certify every personnel decision. For every small and medium size employer which has neither the volume of personnel decisions nor the resources to warrant the implementation of a sophisticated and costly personnel research program, the course urged by Petitioner would be intolerable. For large employers making thousands of personnel judgments based on both standardized devices and managerial judgments, the cumulative burden of Petitioner's requirements would be staggering.

Fortunately, when presented with opportunities to impose restrictions on business judgment like those Petitioner demands, this Court has consistently followed the enduring principle of permitting legitimate managerial discretion.

2. In Its Leading Title VII Decisions, This Court Has Refused To Extend Disparate Impact Analysis To Manager's Judgments Of Individual Employees.

The legitimate role of managerial judgment in personnel decisions has never been in doubt in the decisions of this Court. Indeed, the Court's leading Title VII decisions have repeatedly reaffirmed the fundamental principle that Congress intended to preserve business discretion in personnel matters with only narrow, well-defined exceptions. The primary exception is intentional discrimination against members of protected groups. *Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). The legitimate scope of managerial discretion emerges with particular clarity when the opinions defining this Court's approach to proof of unlawful discrimination are examined in light of the lower court theories they rejected—theories remarkably similar to Petitioner's misguided notion of how disparate impact analysis might be applied to individual personnel judgments.

In *Green v. McDonnell Douglas Corp.*, 463 F.2d 337 (8th Cir. 1972), the Eighth Circuit Court of Appeals misapplied *Griggs* in holding that a black job applicant could not be rejected unless the employer validated the reason for rejecting him by proving its relationship to actual job performance. Percy Green, a black man and a long-time civil rights activist, had been laid off from McDonnell Douglas. When hiring resumed, the company rejected Green's application because of his participation in a series of public demonstrations protesting McDonnell's allegedly discriminatory employment practices. *Id.* at 339. The Court of Appeals addressed the key question of whether it was necessary for McDonnell to validate this rationale by affirmative proof of a relationship between participation in such demonstrations and Green's actual work performance.

> The record shows that McDonnell has taken the position that it has the right under Title VII to make subjective hiring judgments which do not necessarily rest upon the ability of the applicant to perform the work required. . . .
>
> Our prior decisions make clear that, in cases presenting questions of discriminatory hiring practices, employment decisions based on subjective, rather than objective, criteria carry little weight in rebutting charges of discrimination. We reaffirm this principle here. "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." [*Griggs*]. . . . Judicial acceptance of subjectively based hiring decisions must be limited if Title VII is to be more than an illusory commitment to that end, for subjective criteria may mask aspects of prohibited prejudice.

Id. at 343-4 (citations omitted).

This Court thus reviewed—and rejected—a well articulated theory for requiring employers to validate the reasons for individual personnel judgments by proving their job relatedness. Writing for a unanimous Court, Justice Powell's words speak directly to contentions advanced by Petitioner in the present case. First, the Court discredited the notion that McDonnell's rationale was illegitimate because it reflected a "subjective" judgment.

> The Court of Appeals intimated . . . that petitioner's stated reason for refusing to rehire respondent was a "subjective" rather than objective criterion which "carr[ies] little weight in rebutting charges of discrimination." . . . [W]e think the court below seriously underestimated the rebuttal weight to which petitioner's reasons were entitled.

McDonnell Douglas Corp. v. Green, supra, 411 U.S. at 803-6 (emphasis added). The Court then explained that disparate impact analysis was not intended to be applied to individualized judgments.

> The court below appeared to rely upon[*Griggs*] . . . But *Griggs* differs from the instant case in important respects. It dealt with *standardized testing devices* which, however neutral on their face, operated to exclude many blacks who were capable of performing effectively in the desired positions. . . . [*P*]*etitioner does not seek* [*Green's*] *exclusion on the basis of a testing device which overstates what is necessary for competent performance, or through some sweeping disqualification of all those with any past record of unlawful behavior*, however remote, insubstantial, or unrelated to applicant's personal qualifications as an employee. Petitioner assertedly rejected respondent for unlawful conduct against it and, *in the absence of proof of pretext or discrimina-*

> *tory application of such a reason, this cannot be thought the kind of "artificial, arbitrary, and unnecessary barriers to employment"* which the Court found to be the intention of Congress to remove.

Id. at 805-6 (citations and footnotes omitted) (emphasis added).

If there could be any doubt about whether this Court meant what it said in *McDonnell* in distinguishing the systematic disqualifying mechanisms rejected in *Griggs* from the individualized judgment attacked by Mr. Green, all such doubt should have been extinguished by the Court's decision in *Furnco Construction Corp., supra.* Once again, the full significance of this Court's opinion can be understood only by recalling the Court of Appeals analysis that was rejected.

Furnco Construction Corporation, a mason contractor, did not maintain a permanent force of bricklayers and did not accept applications from bricklayers looking for work. Instead, a superintendent selected for each job hired bricklayers from among those he knew to be experienced and competent. Black bricklayers complained that Title VII was violated by Furnco's policy of permitting a white superintendent to hire from a "personal list" which contained only the names of white bricklayers. The district court held that the black bricklayers had failed to prove a claim under either the "'disparate treatment' theory of *McDonnell Douglas*, . . . or the 'disparate impact' theory of *Griggs*."[5] The district court thought Furnco's hiring policy was justified by the company's need to hire bricklayers competent to meet its special needs and the practical difficulty of evaluating the qualifications of bricklayers appearing at the gate.[6]

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[5] *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 569 (1978).

[6] *Waters v. Furnco Construction Corp.*, 551 F.2d 1085, 1088-89 (7th Cir. 1977).

The Court of Appeals disagreed. Relying in part on the requirement of job relatedness set forth in *Griggs*, the Seventh Circuit held that Title VII required a less discretionary, more well-structured system for hiring bricklayers.

> It seems to us that there is a reasonable middle ground between immediate hiring decisions on the spot and seeking out employees from among those known to the superintendent. A written application could be taken, with inquiry as to qualifications and experience. The applicant's claims could be checked and evaluated, and compared with the qualifications and experience of those on the list. . . . The method used, relying on recollections of the brick superintendent and recommendations he accepted from others, was by its nature haphazard, arbitrary, and subjective.
>
> . . .
>
> In *Griggs* . . ., the Supreme Court dealt with the use of testing devices in deciding whether to employ or promote. The Court held, "The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. Devices and mechanisms must not be given 'controlling' force unless they are demonstrably a reasonable measure of job performance."

Waters v. Furnco Construction Corporation, 551 F.2d 1085, 1088-89 (7th Cir. 1977) (citations omitted).

This Court "granted certiorari to consider whether the Court of Appeals had gone too far in substituting its own judgment as to proper hiring practices . . ." *Furnco Construction Corporation v. Waters*, *supra*, 438 U.S. at 574. The Court concluded that a "personal list" hiring policy was *not* the kind of facially neutral employment policy

subject to "disparate impact" analysis under *Griggs*, and warned courts not to substitute their view of good personnel practices for those of employers. In view of the Court of Appeals' reference to *Griggs*, this Court was careful to state expressly that reliance on *Griggs* was inappropriate.

> This case did not involve employment tests, which we dealt with in *Griggs* . . . and in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 412-13 (1975), or particularized requirements such as the height and weight specifications considered in *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977), and it was not a "pattern or practice" case like *Teamsters v. United States*, 431 U.S. 324, 358 (1977)

Id. at 575, n.7.[7]

Moreover, this Court was explicit in rejecting the concept that a personnel system must be "objective" or rational or systematic in order to comply with Title VII.

> The dangers of embarking on a course such as that charted by the Court of Appeals here, where the court requires businesses to adopt what it perceives to be the "best" hiring procedures, are nowhere more evident than in the record of this very case. Not only does the record not reveal that the court's suggested hiring procedure would work satisfactorily, but there is nothing in the

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[7] Petitioner's perception that the Court did not reject application of disparate impact analysis in *Furnco*, but was merely noting a lack of evidence of impact (Pet. Br. 30), was not shared by other important observers. Two Justices dissented in part because of the Court's decision "to *foreclose on remand* further litigation on the Griggs question of whether petitioner's hiring practices had a disparate impact." 438 U.S. at 583 (emphasis added). On remand, the Seventh Circuit described this Court's decision as a determination that the Court of Appeals "had gone too far in requiring [the] *method*" of proof set forth in *Griggs*. *Waters v. Furnco Construction Corp.*, 688 F. 2d 39, 40 (7th Cir. 1982).

> record to indicate that it would be any less "haphazard, arbitrary and subjective" than Furnco's method, which the Court of Appeals criticized as deficient for exactly those reasons. *Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it.*

Id. at 578 (emphasis added).

In the case at bar, the Fifth Circuit Court of Appeals relied on its prior decision in *Pouncy v. Prudential Insurance Co.*, 668 F.2d 795 (5th Cir. 1982), in holding that "disparate impact" analysis was not the proper vehicle for analyzing Petitioner Watson's claim of discrimination. *Watson v. Fort Worth Bank & Trust*, 798 F.2d 791, 797 n.12 (5th Cir. 1986). In *Pouncy*, the Fifth Circuit carefully applied this Court's decision in *Griggs*, *supra*, and explained in particularly sensible, practical terms why "disparate impact" analysis may only be applied to a specific employment mechanism with a clear causal link to the disqualification of a protected class of individuals.

> The discriminatory impact model of proof in an employment discrimination case is not . . . the appropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a company's employment practices. Nor may just any employment practice be challenged under this model simply because an uneven racial balance exists in an employer's workforce. As originally conceived in *Griggs* . . ., the disparate impact theory applied to an "overt, clearly identified nondiscretionary selection criteri[on] that [was] applied at a single point in a selection process." Although some courts have used the disparate impact model of proof to challenge multiple employment practices simultaneously, . . . this is an incorrect use of the model. *The disparate impact*

> *model applies only when an employer has instituted a specific procedure, usually a selection criterion for employment, that can be shown to have a causal connection to a class based imbalance in the workforce.*
>
> . . .
>
> . . Identification by the aggrieved party of the specific employment practice responsible for the disparate impact is necessary so that the employer can respond by offering proof of its legitimacy. . . . *We do not permit a plaintiff to challenge an entire range of employment practices merely because the employer's work force reflects a racial imbalance that might be causally related to any one or more of several practices for to do so "would allow the disparate impact of one element to require validation of other elements having no adverse effects."*

Pouncy, supra, 668 F.2d at 800-1, (emphasis added) (citations omitted).

Thus, in *Pouncy* the Fifth Circuit identified what is the fatal flaw in Petitioner's unfocused attack on the Bank's "subjective" employment selection procedures. Petitioner fails to identify any specific promotion criteria or device which she claims produced a racial imbalance among the Bank's supervisors.[8] Petitioner's complaint is not about the use of any particular criterion, whether "objective" or "subjective", but about the use of a process that includes managerial judgment. What criterion or device was it that caused the "racial imbalance" about which Petitioner complains? In *Griggs* the causal connection was clear—here, Petitioner has made no effort to show causation. What

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[8] Of course, the record showed that only two black employees ever applied for supervisory positions which ultimately were awarded to whites. (J.A. 201)

criterion would the Bank attempt to validate if disparate impact were applied? With no evidence of a causal link to a specific practice, if a burden of validation were imposed on the Bank it would be forced to direct its statisticians to validate every facet of its selection process.

If Petitioner's contention is merely that the criterion that actually caused the Bank to prefer her competitors is one that the Bank will never articulate—namely, race—then Petitioner's claim falls squarely within the disparate treatment paradigm of *McDonnell Douglas* and *Furnco*, *supra*. Of course, the district court has already judged that the Bank's stated reasons for its treatment of Petitioner were genuine. The fact that Petitioner failed to persuade the district court that the Bank treated her differently than her white competitors does not justify her call for the application of the *Griggs* model of proof in circumstances it was never meant to address.

C. The American Psychological Association Seeks Inappropriately To Use Title VII To Impose Lofty Professional Standards On Individual Personnel Decisions Of Every Description.

Petitioner's amicus, The American Psychological Association ("APA"), introduces its brief with the disclaimer that it "will leave it to the parties to argue whether disparate impact analysis under Title VII . . . is properly applied to review the legality of subjective assessment devices for the hiring and promotion of employees." (APA Br. 2.) The APA explains that its limited purpose is merely to show, as a matter of psychometrics, that procedures like those used by the Bank *can* be "scientifically validated."

However, contrary to its opening disclaimer, the APA proceeds to argue not only that the Bank's employment devices *could* be validated but that they *should* be validated as a matter of law under Title VII. ASPA, IPMA and EMA respectfully disagree. Rather than presenting convincing reasons why employers should be forced to adopt

complex, statistically based personnel practices, the parade of research findings invoked by the APA shows the Court how burdensome such an imposition would be and how, in the final analysis, the "validation" recommended by the APA would do little to advance the cause of equal employment opportunity.

The APA's call to require validation of all selection devices—including processes like employment interviews—hinges on the faulty legal conclusion that "[t]he crucial public policy goals of Title VII would be thwarted if employers could rebut claims of discrimination simply by pointing to the results of unvalidated assessment devices, whether subjective or objective." (APA Br. 29.) This statement reflects a basic misunderstanding of Title VII law. Evidence simply describing the result of a choice between two employees is never enough to defend a disparate treatment claim. To rebut Petitioner's claim of discrimination the Bank had to do much more than simply "point to the results" of its managers' judgments. Under *McDonnell Douglas*, *supra*, the Bank was required to explain the factors that distinguished Petitioner from her competitors and, ultimately, the district court had to be convinced that those factors were the genuine reasons for its decision.

In view of the slender legal reed supporting the APA's position, the extreme financial and administrative burden that would be imposed on employers by the result it seeks looks even more out of place.[9] While the process of "sci-

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[9] ASPA, IPMA and EMA will not engage the APA in a technical debate about whether every legitimate selection device and criterion is amenable to "scientific validation" because even if that is true, such validation should not be required as a matter of law. One must wonder, however, whether "scientific" personnel selection devices will detect that certain something that makes one individual the perfect assistant to a particular supervisor, or that leads a decision maker to take a chance on an applicant because his or her unique personal history demonstrates an irresistible desire to succeed.

entific validation" may seem straightforward to a few industrial psychologists, the APA brief shows it to be a process of enormous complexity and one totally foreign to employers who rely in large measure on their managers' knowledge of employees in making promotion decisions. In the world of the APA, a single promotion decision is a journey that begins with many steps.

> There are many elements involved in the construction, development, and evaluation of an assessment instrument. Industrial psychologists and others who create a test or other selection procedure must choose the domain to be assessed, construct the items to which test takers will respond or select the behaviors to be observed, develop scaling scores and norms so that results can be interpreted, prepare manuals, and most importantly, ensure that the instrument is psychometrically sound. The psychometric soundness of an instrument depends primarily on it being reliable and valid.

APA Br.9 (citations and footnotes omitted). The search for domains, scaling scores and the rest begins with the "essential prerequisite activity . . . known as job analysis." (APA Br.12.)

> Satisfying this essential prerequisite requires an analysis of the job in question, and a clear articulation of the knowledge, skills and abilities ("KSAs") or other personal characteristics or behaviors the exhibition of which determine proficiency at that job. These data can be secured through judgments of job incumbents, their supervisors, personnel specialists,[10] the professional

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[10] The APA does not explain why an industrial psychologist performing a job analysis may rely upon the "judgments" of incumbents and

> judgment of job experts, and through training manuals, job descriptions, and other written information. In addition, the relative importance of these KSAs must be determined. Finally, a close link between the assessment device and the identified job content or behavioral characteristic (construct) must be established.

APA Br.12-13 (citations and footnotes omitted).

In fact, a great many employers subject to Title VII do not now have job descriptions for each position in their organization—some have no job descriptions at all. Nor do many employers have personnel specialists, job experts or others prepared to produce job analyses in the manner called for by the APA for each current position or for new positions being created all the time. No law requires employers to maintain the personnel documents required for the APA's purposes. In accordance with the principle of non-interference, the equal opportunity laws have never mandated the personnel procedures and documents employers must use to manage their businesses. The position urged by the APA would do just that. The judgments of managers would be superseded by the computations of industrial psychologists. These requirements would exist not just for positions for which an individual employer decided to impose a screening test like the one reviewed in *Griggs*, *supra*, but for all positions filled by devices such as interviews and work histories—that is, for virtually *all* positions. Only a revolutionary interpretation of the meaning of employment discrimination would require this result.

As the APA explains its concept of personnel administration, the work of job analyses would only lay the groundwork for the process of "scientific validation." "For validation to be meaningful, it must predict performance

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supervisors while an employer's reliance on the judgments of its managers threatens to "undermine the purposes of Title VII." (APA Br. 21).

of a *particular* task or set of tasks . . . Thus, selection procedures or devices are validated for a particular job. . . ." (APA Br.10, emphasis original).[11] Not only must each device or criterion be validated separately for each job, according to the APA, but it is quite clear that business judgments thought to enjoy universal acceptance would be of no value in judging validity. "It could very well be that [Petitioner's] experience as a teller would be predictive of her success as a supervisor of tellers, but without an analysis of both positions, that assumption could very well be faulty." (APA Br.26.) According to the APA, in order for the Bank to properly credit Petitioner's work experience, it would have to treat "experience as one part of a carefully selected and logically and empirically justified comprehensive biographical data inventory." (APA Br.27.)[12]

Despite having every opportunity to do so, Petitioner has identified no specific employment criterion—such as experience—which has produced a disparate impact. Since Petitioner has claimed that it was the Bank's promotion process in general that has done so, the meaning of a requirement of "scientific validation" must be examined for the essential component of that process—the interview. The APA contends that interviews must be "scientifically validated." (APA Br. 14-17.) In essence, the APA says

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[11] The requirement of separate "scientific validation" for each selection device used for each position, and the focus on the personal characteristics of individual interviewers (APA Br. 14-17), is totally inconsistent with the APA's suggestion that firms with limited resources might conduct "crude validity studies" or use selection devices developed by others. (APA Br. 27.) Armed with the APA's definition of true "scientific validation," there is no reason to believe that Petitioner would have been satisfied with a "crude" substitute.

[12] The APA can point to no section of its *Standards for Educational and Psychological Testing* (1985) (the *"Standards"*) in support of this proposition. Indeed, the relevant section of its *Standards* suggests that reliance upon the established job performance record of an incumbent employee is a perfectly acceptable basis for deciding whether to promote that individual. *Standards* at 59.

that an interview is valid only if the interviewer asks questions that are "carefully linked to job analysis and performance criterion data" (APA Br. 16) and if the interviewer has been trained to elicit and interpret information. And according to the APA, the more interviewers the better. (APA Br. 16.) If linking questions to performance criterion data means measuring candidates during interviews in terms of criteria that have been validated independently, the validity of interviews as a device boils down to qualities of the interviewer. Did the interviewer have the "ability to relate" well to the candidate? (APA Br. 23.) Was the interviewer biased in favor of candidates "like him"? Did the interviewer use a stereotype to judge an individual candidate? (APA Br.14-15.)

This definition of interview validity means that after the position descriptions are written, domains defined, KSAs ranked, scores scaled, and results validated, Petitioner's challenge to the Bank's interview process turns on whether the manager who made the decision was biased. This, of course, was the essence of the disparate treatment analysis already completed by the district court. The circle of Petitioner's reasoning is thus complete. Consistent with this Court's view of the limited role of the disparate impact model of proof, analysis of a manager's intent should be the first, last and only analysis appropriate for deciding whether an employer has discriminated unlawfully in making an individual promotion decision.[13]

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[13] Indeed, contrary to the fairly rigid definition of "scientific validation" presented in the APA's Brief, the APA's own *Standards*, *supra* note 10, recognize that "it is not appropriate to tell a test user that particular levels of predictive validity and reliability need be met . . .," that "[c]ost-benefit compromises become . . . necessary . . .", and that "when test standards are not met in test use, reasons should be available." *Id.* at 41. Examination of an employer's reasons for action is what disparate treatment analysis is all about. Thus, the APA's professional standards describe a variety of circumstances in which all the work of "scientific validation" will not—and should not—resolve the matter of who should be selected in a particular case.

If the present debate was about good personnel practices rather than legal duties and liability, ASPA, IPMA and EMA would stand shoulder to shoulder with the APA in urging employers to adhere to the highest possible professional standards when designing their personnel practices. But that choice ought to be left to each employer's judgment about what is best for its business. On this point, we agree wholeheartedly with the APA's position before this Court in *Washington v. Davis*, 426 U.S. 229 (1976):

> [I]t is manifestly inappropriate for this profession to impose its ideals upon employers charged with meeting legal requirements while maintaining a profitable business.

Id., APA Brief as Amicus Curiae, No. 74-1492, at 28.

If the Court were to adopt the APA's standards for "scientific validation" as the test of Title VII compliance in reviewing individual promotion decisions, it should understand the risk of a paradoxical result. Many employers may not be able to afford to hire "validators" to certify the legitimacy of their managers' individual personnel decisions. Indeed, the APA's definition of validity is so closely tied to individual worksites, positions and decision-makers that the number of validations and revalidations to be performed could greatly exceed the productive capacity of the country's industrial psychologists.[14] For these or other reasons, some employers may be forced to choose an alternative to validation that is readily available but completely unacceptable. Validation would not be required of employers who abandon all criteria and judgment and sim-

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[14] Several hundred thousand employers are subject to Title VII. The number of different positions, employment criteria and decision-makers each requiring separate "scientific validation," according to the APA, is unfathomable. Yet, the APA's membership includes only 2,500 industrial psychologists. (APA Br. 1.) Employers must wonder whether anyone would be available to do the work of "scientific validation" Petitioner would have this Court require.

ply use quotas to make sure that managers' individual decisions do not create any numerical imbalance in their workforce. Hiring and promoting employees on the basis of class membership, of course, is precisely what Title VII was intended to prohibit.[15]

There is a very great difference between requiring "scientific validation" by an employer who *chooses* to use a specific screening device to narrow a field of applicants—as was the case in *Griggs*, *Albemarle*,[16] *Dothard*,[17] *New York City Transit Auth. v. Beazer*,[18] and *Connecticut v. Teal*,[19]—and requiring "scientific validation" by an employer that excludes no one from consideration but judges the qualities of each candidate individually. Those individual judgments are proper subjects for disparate treatment analysis. But employers who have not erected barriers to employment opportunities should not be saddled with compliance with any set of professional personnel standards simply as a cost of doing business.

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[15] Professor Bartholet has recognized that "quota or racially proportionate hiring" may result from the application of disparate impact analysis in the manner urged by Petitioner. Bartholet, E., *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 945, 1026-7 (1982). In fact, Professor Bartholet concludes that racially proportionate hiring "seems an appropriate solution." *Id.*

[16] 422 U.S. 405 (1975) (written tests).

[17] 433 U.S. 321 (1977) (height and weight restrictions).

[18] 440 U.S. 568 (1979) (drug user exclusion).

[19] 457 U.S. 440 (1982) (written tests).

Conclusion

For all of the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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November 1987